

21-7312

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

FEB 28 2022

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Daniel Viveiros — PETITIONER
(Your Name)

vs.

The Commonwealth of Massachusetts — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Judicial Court for the Commonwealth of Massachusetts
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Daniel Viveiros
(Your Name)

500 Colony Rd
(Address)

Gardner, MA 01440
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1. Whether the trial court erred be admitting, without expert medical testimony, evidence of the complainant's stomachaches and bladder pain purporting to corroborate her allegations of sexual assault?
2. Whether the commonwealth deprived the defendant of his state and federal due process rights where the trial prosecutor (a) grossly misstated the first complaint witness's testimony in closing argument; (2) Violated the bar against Successive complaint testimony and (3) Improperly vouched for the first complaint witness and the complainant?
3. Whether the cumulative effect of the trial errors, all of which tended to bolster the complainant's uncorroborated allegations, deprived the defendant of his state and federal due process rights and require a new trial?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Massachusetts Appeals court appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 12/21/21.
A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

Artical 12 Massachusetts Declaration of Rights

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for government of the army and navy, without trial by jury.

STATEMENT OF THE CASE

Case Number: BRCR2016-00289

On September 8, 2016, a grand jury returned a ten-count indictment against Daniel Viveiros. [FN1] The indictment charged him with (1) Rape of a child, aggravated by a five year age difference, in violation of M.G.L c. 265, § 23A; (2) Four counts of indecent assault and battery on a child under the age of fourteen, in violation of M.G.L c. 265, § 13B; (3) Two counts of dissemination of obscene material harmful to a minor in violation of M.G.L c. 272, § 28A

Case Number: BRCR2018-00289

On January 11, 2018, A Bristol grand jury returned another indictment against Viveiros. It charged him with three counts of rape of a child, aggravated by a five year age difference in violation of M.G.L c. 265, § 23A. R. 27-32. The alleged victim was the same person as in the 2016 indictment.

The superior court consolidated the two indictments for the purposes of trial. The Honorable Karen Green presided over a jury trial between July 9, 2019 and July 18, 2019. After deliberating on July 17 and 18, 2019, the jury returned guilty verdicts on all charges of the indictments.

Judge Green sentenced Viveiros to consecutive sentences of ten-to-fifteen years on the first counts of the 20016 and 2018 indictments. She also imposed a consecutive five-to-ten year sentence on count 2 of the 2016 indictment. The remaining sentences were to be concurrent. Viveiros filed a timely notice of appeal on July 26, 2019.

[FN1] For the redactions of the names that appear in the record see appendix A.

Statement of facts

The complainant, A.T., was born on April 14, 2006 she first met Viveiros, her mothers boyfriend when she was "about eight [or] eight and a half?" A short time after Viveiros started dating A.T.'s mother, he moved in with them in New Bedford MA.

One night A.T. went to be and woke up to find Viveiros on top of her. Her "nightgown was up and [her] underwear was down." His "private" was touching her "private?" She said his penis was "alittlebit in."

According to A.T. incidents "continued" "[e]very other day when [her] mom was in the shower or she was at work." Viveiros put his "penis inside of [her] vagina... more than one time." "things changed," as well, with Viveiros having her touch him and "watch videos." A.T. testified that the events occurred in "[T]he living room, [her] mom's room, [and her] room" both in New Bedford and after they moved to Swansea.

At a certain point Viveiros and A.T.'s mother had a child L.V., and got married. The interactions between Viveiros and A.T. continued after the marriage. The incidents allegedly occurred when A.T. was between eight-and-a-half and ten years old.

Over objection, A.T.'s mother testified that A.T. suffered from Stomachaches and bladder pains. According to the mother, the stomachaches started around the time Viveiros entered their lives and resolved themselves when he left the household. A.T.'s mother brought her to urgent care centers, her pediatrician's office and to a childrens hospital.

All medical professionals failed to come up with a definitive diagnosis.

After A.T. made her allegations, she was examined by medical professionals. Her examination proved normal. The commonwealth's expert testified that a "normal examination does not exclude nor does it confirm that [vaginal] sexual penetration has occurred."

The First complaint testimony and the closing argument. At trial, A.A. testified, in pertinent part, as follows:

A: [A.T.] asked me if i could keep a secret and i said yes. And she told me that danny was raping -- well, making him touch her-- I mean, making her touch him in his private area.

Q: Okay. Is that the only thing she told you during that first conversation?

A: Yes.

Q: Okay. Do you remember her telling you anything that came out of his penis or anything else like that?

A: Not that first conversation no.

Q: So you had more than one conversation?

A: Yes

IN her closing argument, the trial prosecutor argued: Let's talk about [A.A.]. Yes, they're very close, no doubt. And yes, she said to you on the witness stand, you know what, I'm confused and i really don't remember. Why?

I would submit to you that they had multiple conversations. Does that make sense? They're best friends, they're cousins. Of course they talked, and they talk about this more than once. She doesn't know what was said first. She doesn't remember that right? But when she got up there, she said to you -- and this is how we know there was more than one conversation, she told me rape -- rape, and she was about to say raped her, took it back and realized that wasn't the first conversation. But we know there was a conversation about that though, don't we.

REASONS FOR GRANTING THE PETITION

I. THE TRIAL JUDGE ERRED IN ADMITTING, WITHOUT EXPERT OPINION TESTIMONY, EVIDENCE THAT PROMOTED AN INFERENCE THAT A.T.'S PHYSICAL SYMPTOMS SUPPORTED HER CLAIMS OF ABUSE.

Over objection, the trial court admitted A.T.'s mother's testimony that A.T. suffered from bladder pain and stomachaches during the period Viveiros was purportedly sexually assaulting her. The Appeals court grudgingly acknowledged that the commonwealth could not introduce evidence of A.T.'s bladder pain without expert medical testimony on a causal link between sexual abuse and "bladder issues." Slip op. at 4, citing commonwealth v. hamel, 91 Mass. app. ct 349, 351 (2017).

Misreading this court's precedent, however, the Appeals court held that no expert testimony was required to establish a causal relationship between A.T.'s stomachaches and the alleged sexual assaults. See Slip op. at 4, citing commonwealth v. hudson, 417 Mass. 536, 542 (1994). Armed with its finding that the trial judge only partially erred by admitting, without supporting expert testimony, evidence of A.T.'s chronic stomachaches and bladder issues during the time she lived with Viveiros, the Appeals Court found no prejudicial error. Slip op. at 5. This finding cannot stand.

- A. The Appeals court correctly found that the trial court erroneously admitted lay testimony, without supporting expert testimony, that A.T. suffered from bladder ailments during the time of the alleged sexual assaults.

The Appeals Court recognized that the Commonwealth could not introduce evidence that A.T. suffered from "bladder issues" during the time of the alleged sexual abuse without also presenting expert medical testimony on causation. See, Slip op. at 4. In light of the Massachusetts supreme judicial court's prior decisions, the Appeals Court's holding was inescapable. See, e.g., Commonwealth v. Kirkpatrick, 423 Mass. 436, 447 (1996); Commonwealth v. Hrabak, 440 Mass. 650, 653, 656 (2004), overruled on other grounds, Commonwealth v. King, 445 Mass. 217 (2005).

B. The admission of lay testimony about A.T.'s chronic, clinically significant stomachaches corresponding temporally with the alleged sexual assaults was error in the absence of expert medical testimony on the issue of causation.

Relying on Commonwealth v. Hudson, 417 Mass. 536, 542 (1994) the Appeals Court held that "it is within the common knowledge and experience of lay jurors that children may exhibit stomachaches as a result of anxiety or distress." Slip op. at 4. It therefore concluded that the lay testimony about A.T.'s stomachaches was admissible in the absence of expert testimony on a causal link between her symptoms and the alleged sexual assaults. Id.

The Appeals Court's faulty conclusion rests on a shocking misreading of Hudson. In that case, the victim's mother testified that the victim "went to the hospital 'a lot' because of stomach pain" during the time of the incident. Hudson, 417 Mass. at 50-51. As the Commonwealth certainly recognized, however, the prosecution could only introduce that lay evidence

by calling an expert on physical symptoms that sexually abused children may experience. *Id.* at 52.

In this case, the Massachusetts Appeals Court drew exactly the wrong lesson from *Hudson*. The lay testimony in *Hudson* was admissible because the Commonwealth offered expert testimony that permitted the jury to properly appraise the probative value of the accuser's symptoms.

Had the jury heard from an expert in ~~this case~~ they would have learned that "symptoms such as stomachaches [do] not automatically prove" allegations of sexual abuse. *Id.* at 52. Indeed, the Commonwealth's expert in *Hudson* testified that stomachaches may "be caused by a variety of things" and "often times ... occur as part of a child's normal development." *Id.*

Hudson illustrates the rational for the rule requiring expert testimony on medical causation. It cautions jurors who may otherwise fall prey to the "shopworn logical fallacy" of "confusing temporal correlation with causation." *S. Bakeries, LLC v. NLRB*, 871 F.3d 811, 840 (8th cir. 2017) (Gruender, J., concurring in part, dissenting in part).

In *Hudson*, lay testimony about the victim's stomachaches was admissible only because the Commonwealth presented expert testimony to keep the jury from drawing logically or scientifically unsupported inferences from the evidence. Since the same safeguard was required here, the Massachusetts Appeals Court's holding to the contrary cannot stand.

C. The Massachusetts Appeals Court's half-hearted prejudicial error analysis rested on credibility findings outside an appellate court's purview.

The Massachusetts Appeals Court correctly treated Viveiros's claim as a preserved error and purported to apply the prejudicial error standard. Slip op. at 4-5. Its analysis faltered on two fronts. First, it only considered the effect of the erroneously admitted lay testimony about A.T.'s bladder problems." Slip op. at 5. Moreover, its finding that the " commonwealth's evidence was strong" necessarily rested on credibility assessments that the Appeals Court was in no position to make. Id. The Appeals Court's missapprehension of its own role as a reviewing court calls out for further review.

The Appeals Court's finding that the error was not prejudicial rested, in its entirety, on the following analysis.

Here, apart from the single reference during the mother's direct examination, the victim's bladder problems were not again mentioned, either in questioning, testimony, or closing arguments. The Commonwealth's evidence was strong, and the victim's testimony was corroborated in various aspects, including by the first complaint witness, by the mother, and by text messages from the defendant.

Slip op. at 5.

The Appeals Court's finding that the Commonwealth's case was "strong" is both mystifying and untenable. Its analysis makes clear that the reference to the strength of the "Commonwealth's evidence" is simply an allusion to A.T.'s testimony. But an appellate court is not in the business of assessing the credibility of a complaining witness. Cf. Commonwealth v. pugh, 462 Mass. 482, 495 (2012).

Indeed, the Massachusetts Appeals Court's findings that the Commonwealth's case was strong flies in the face of Massachusetts Supreme Judicial Court's precedent as well as the precedents set by The United States Supreme Court. For the purposes of prejudicial error review, this court would deem this "a close case for the jury" since "[s]uccess for the Commonwealth depended completely on the credibility of the child." Commonwealth v. Alvarez, 480 Mass. 299, (2018). (collecting cases and quoting Commonwealth v. Loguidice, 420 Mass. 453, 457 (2005)).

Moreover, the putative corroboration of A.T.'s testimony was gossamer. There were no percipient witnesses to acts of sexual abuse. Despite the family's close quarters, A.T.'s mother never observed any untoward conduct that prompted her to alert the authorities or to end her relationship with Viveiros. And, far from corroborating A.T.'s account, the first complaint witness, A.A., expressly testified that A.T. did not report that Viveiros had raped her. Indeed, A.A. admitted that her pretrial account of A.T.'s first complaint did not include any reference whatsoever to contact between Viveiros and A.T.

Finally, A.T.'s physical examination by a sexual assault physician came back normal. The Commonwealth sought to address this lacuna with expert testimony that a normal physical examination was not inconsistent with A.T.'s allegations.

The core factual dispute was whether A.T.'s testimony was believable beyond a reasonable doubt in the absence of any physical evidence supporting her allegations.

"The suggestion that the physical condition experienced by the child was the result of the abuse [s]he described could serve as a powerful forensic corroboration of the child's testimony." Hamel, 91 Mass. App. Ct. at 353. With the appeals Court's assessment of prejudice resting impermissibly on its own credibility determinations, its ruling represents a jurisprudential failure that this court must remedy.

II. THE TRIAL PROSECUTOR GROSSLY MISSTATED THE EVIDENCE, ABUSED THE FIRST COMPLAINT RULE AND IMPROPERLY VOUCHED FOR BOTH THE COMPLAINANT AND THE FIRST COMPLAINT WITNESS.

During closing argument, the trial prosecutor struggled to reconcile A.T.'s rape allegations with the first complaint witness's testimony that A.T. reported a far less serious offense. The prosecutor argued, however, that "we know" that A.T. made a successive complaint to the First-complaint witness, A.A., in which A.T. "reported ... that the defendant 'raped' her." Slip op. at 66.

The Appeals Court acknowledged that the closing argument was not supported by the record, since A.A. never testified that such a report had been made. It further noted that the trial prosecutor's formulation improperly "conveyed, at least inferentially, the prosecutor's belief about either certain witnesses or the credibility of certain witnesses." Slip op. at 7-8, quoting Commonwealth v. Burts, 68 Mass. App. Ct. 684, 688-89 (2007).

It nonetheless concluded that the prosecutor's misconduct did not give rise to a substantial risk of a miscarriage of justice. Slip op. at 8.

The Appeals Court's holdings rested once again on its faulty finding that the "Commonwealth's case was strong." Id. It further observed, inexplicably, that the error "did not go to the heart of the case." Id.

Yet A.T.'s credibility was the heart of the case. The jury could not convict Viveiros if they doubted her story or believed only part of it. Indeed, the entire rationale for admitting A.A.'s first complaint testimony was to allow the jury to "assess the credibility and reliability of [A.T.'s] testimony here in court" by eliciting, among other things, "any discrepancies in the complainant's story." Commonwealth v. King, 445 Mass. 217, 242-245 (2005).

Assuming arguendo that the first complaint doctrine exists to improve the accuracy of the jury's fact-finding, see Id., the trial prosecutor's improper argument stymied that objective. The prosecutor erased the serious discrepancy between A.T.'s trial testimony and her first complaint by fabricating a subsequent, consistent complaint.

More egregious still, the trial prosecutor conveyed the distinct and false impression that she personally knew that A.T. subsequently told A.A. that she had been raped. See Commonwealth v. Kee, 449 Mass. 550, 560 (2007). In the context of a trial where the jury learned that the trial prosecutors met privately with A.T. and A.A. on multiple occasions, the false assertion that "we know" the complaint evidence

fully corroborated A.T.'s testimony gave rise to a substantial risk of miscarriage of justice.

This court should grant this petition for writ of certiorari because the case presents examples of prosecutorial misconduct that is very likely to recur. The trial prosecutor knew that she could not come out and ask A.A. whether A.T. subsequently reported that Viveiros had raped A.T. See commonwealth v. Arana, 453 Mass. 214, 222-223 (2009). thus, in lieu of posing the forbidden question, the trial prosecutor observed the legal rule during examination and flouted it in closing argument.

The Massachusetts Appeals Court's ruling in this case sends all the wrong messages to prosecutors. ~~Most~~critical, it suggests that closing arguments are a safe have for end-runs around law. This Court must therefore act to discourage this form of misconduct from taking hold in all future proceedings.

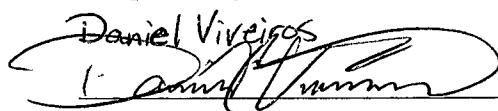
III. THE CUMULATIVE EFFECT OF TRIAL ERRORS
IMPROPERLY BOLSTERED A.T.'S CREDIBILITY
AND RENDERED THE TRIAL FUNDAMENTALLY
UNFAIR.

The Massachusetts Appeals Court acknowledged Viveiros's claim of cumulative error, See Commonwealth v. Gonzalez, 28 Mass. App. Ct. 906, 907 (1989), but nonetheless rejected it without any meaningful explanation. That both errors improperly bolstered A.T.'s testimony in a case hinging on her credibility surely warranted more than a footnote declining to "separately discuss their cumulative effect." slip op. at 8. This Court should grant this petition for writ of certiorari because the Massachusetts Courts did not meaningfully review and apply the law while attacking his conviction if the first instance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Daniel Viveros
James H. Turner

Date: 2/28/22